Supreme Court, U. S.
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In The

# Supreme Court of the United States

October Term, 1975

No. 75-1548

RICHARD WIENER,

*Petitioner,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

*To: The Honorable, The Chief Justice of the United States, and the Associate Justices of the United States Supreme Court*

The petitioner, Richard Wiener, respectfully prays that a writ of certiorari issue to review a judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on March 24, 1976.

## OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the appendix hereto. No opinion was rendered by the District Court for the Southern District of New York.

## JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on March 24, 1976 and is set forth in the appendix hereto.

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

No extension of time within which to file the instant petition has been sought.

## QUESTION PRESENTED

Whether the trial court's comments to the jury on the credibility of the Government's principal witness deprived the defendant of his right to a trial by jury?

## STATEMENT OF THE CASE

Petitioner was convicted after a trial by jury in the United States District Court of one count of conspiracy to distribute and possess with intent to distribute hashish [21 U.S.C. §841(a)(1), §841(b)(1)(B)], one count of possession with intent to distribute hashish [21 U.S.C. §841(a)(1), 841(b)(1)(B)], and one count of simple possession of marijuana.



The principal Government witness against petitioner was an alleged accomplice, Steven Silverman. Two months after the alleged crime and three months prior to the petitioner's trial, Silverman was hospitalized for a period of three weeks in a psychiatric facility.

The defense contended at trial that Silverman's recent history of mental instability undermined his trustworthiness as a witness, and argued to the jury that the testimony of such a witness could not serve as the basis for a finding of guilt beyond a reasonable doubt.

In his summation, defense counsel argued:

> "Perhaps the most obvious thing and perhaps you don't even have to say anything more about accepting the word of Stephen Silverman as a basis for a most serious felony conviction is the fact that this man got out of a mental institution three months ago. What does that mean, three months ago? This man who they are asking you to rely on is a person, who couldn't brush his teeth, get dressed in the morning, walk outside on the street and mingle among you and me, let alone come into a courtroom and asking him to be stamped or take him as the stamp which will suffice for a conviction of my client. . . .

> I submit that the testimony of Mr. Silverman, this man who was committed to a mental institution on court order with certification of two doctors just 90 days ago is not that solid, substantial evidence upon which you can say the prosecution has erased doubt in my mind."

In its charge to the jury the court parried this thrust, saying:

> ". . . I don't know how you are going to come out with respect to his testimony and, as I say, I do not wish to make any suggestion but I do say this: that regardless of how he comes out, Silverman is an extremely intelligent person. He considered every question that was put to him carefully and he articulated his responses with consummate care and I respectfully suggest that regardless of what else he may be he is a very intelligent person."[1]

In his appeal to the Court of Appeals for the Second Circuit, petitioner claimed, *inter alia,* that this comment on the witness' intelligence invaded the function of the jury by interfering with its exclusive right to determine the credibility of witnesses. See *United States v. Dunmore,* 446 F.2d 1214 (8th Cir. 1971), *cert. denied,* 404 U.S. 1041 (1971).

1. The court's entire charge is set forth in the appendix to petitioner's brief in the Court of Appeals.



Affirming the conviction, the Court of Appeals stated, "Standing alone, this comment on the credibility of Silverman, especially against the defense contention that he was mentally unstable, might be viewed as coming pretty close to the line of impermissible comment." However, the court found that in light of the trial court's other instructions on credibility,[2] the court's instruction was not error.

## REASONS FOR GRANTING THE WRIT

Although the federal courts, unlike most state courts, have consistently upheld the common law power of the judge to comment on the evidence, see *e.g., Quercia v. United States,* 289 U.S. 466 (1933), there exists no clear guidelines to what extent the judge may give his views on the credibility of witnesses. Indeed, since *Quercia, supra,* and *United States v. Murdock,* 290 U.S. 389 (1933), this Court has not written on this issue.

Petitioner does not contend that any comment by the trial court on the credibility of witnesses is unconstitutional. Indeed, he recognizes that Supreme Court Standard 107, submitted by this Court to Congress, allows such comment. However, mindful that that standard itself was the subject of considerable debate, see 1 Weinstein's Evidence, 107-1 to 107-4, he asks the Court to consider whether the trial court's comment here went beyond permissible limits.

2. One of these comments was, in essence, that a man with a college education is capable of lying. The other, in response to defense counsel's vigorous objection to the charge-in-chief, was a supplemental instruction concerning the accomplice's possible motive to lie. Neither in any way undid the trial court's damaging assessment of Silverman's mental stability.

This case thus raises the significant constitutional issue of to what extent a trial court may comment on the reliability of witnesses without depriving a defendant of his right to trial by jury. *Billeci v. United States,* 184 F.2d 394, 402-3 (D.C. Cir. 1950). This issue goes to the very heart of the criminal process — the determination of guilt or innocence by a jury.

Judge Weinstein has written:

> "The court properly exercises its responsibility to guide the jurors in their search for the truth if it confines its remarks on credibility to those areas where the practical experience of the jurors may be an inaccurate yardstick to measure the veracity of a witness." 1 Weinstein's Evidence, 107-53.

In this case, it is submitted, however, that the jury did not need such an aid in assessing the reliability of the witness. The issue was whether the witness' recent history of mental instability affected his ability to perceive, recall and articulate the event accurately. The trial court had no particular expertise in this area.

Our system of criminal justice is bottomed on the premise that the combined judgment of twelve men and women drawn from a cross-section of the community is as accurate a means as possible of deciding the truth. As Judge Brown stated, in *Knapp v. United States,* 316 F.2d 794, 796 (5th Cir. 1963):



> ". . . The genius of the jury system is to transport [the jurors'] common sense into the machinery of the law. If the law undertakes to prescribe categorically either *what* is truth, or *who* is truthful, or how one goes about ascertaining *who* or *what* is truthful, the verdict becomes something less than the reflection of this process of good common sense" (emphasis in original).

Clear standards as to the extent to which a trial judge is entitled to comment on credibility should be established. The importance of enunciating such standards in order to protect a defendant's constitutional right to a trial by jury justifies this Court's granting the petition for certiorari.

## CONCLUSION

For these reasons, a writ of certiorari should be issued to review the judgment and opinion of the Court of Appeals for the Second Circuit.

Respectfully submitted,

s/ Lawrence S. Goldman

GOLDMAN & HAFETZ
*Attorneys for Petitioner*

# APPENDIX

## OPINION OF THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 266—September Term, 1975.

(Argued September 18, 1975 Decided March 24, 1976.)

Docket No. 75-1218

UNITED STATES OF AMERICA,

*Appellee,*

v.

RICHARD WIENER,

*Appellant.*

Before:

FRIENDLY, TIMBERS and GURFEIN,

*Circuit Judges.*

Appeal from a judgment of conviction after a jury trial in the Southern District of New York, Edmund L. Palmieri, *District Judge,* on three counts of violating the federal narcotics laws.

Affirmed.

LAWRENCE S. GOLDMAN, New York, N.Y. (Goldman & Hafetz, New York, N.Y., on the brief), *for Appellant.*

JO ANN HARRIS, Asst. U.S. Atty., New York, N.Y. (Paul J. Curran, U.S. Atty., and Jeffrey I. Glekel, Asst. U.S. Atty., New York, N.Y., on the brief), *for Appellee.*

*Opinion of the Court of Appeals*

TIMBERS, *Circuit Judge:*

On this appeal from a judgment entered June 3, 1975 after a four day jury trial in the Southern District of New York, Edmund L. Palmieri, *District Judge,* convicting Richard Wiener on three counts of violating the federal narcotics laws, 21 U.S.C. §§812, 841(a)(1), 841(b)(1)(B), 844(a), 846 (1970),[1] Wiener claims that the district court erred in three respects: (1) in finding that he had consented to the search of his apartment; (2) in admitting in evidence a loaded gun found in the same bag that contained marijuana in his apartment at the time of the search; and (3) in charging the jury.[2] For the reasons below, we affirm.

## I.

Turning directly to Wiener's claim that he did not voluntarily consent to the search of his apartment, the court's finding of consent rested primarily on agent Powers' testimony to the following colloquy at Wiener's apartment on October 30, 1974 after Wiener's arrest:

"[Powers]: Do you have any narcotics in the apartment?

[Wiener]: If you find any, you can have them.

[Powers]: Does this mean you are giving us your consent to search the apartment?

[Wiener]: If you can find any, you can have them."

At the day and a half suppression hearing which immediately preceded the trial, there was sharply conflicting evidence—by agents Powers and O'Connor on the one hand, and by Wiener and his wife on the other—as to the circumstances of the search. At the conclusion of the hearing and upon the entire record, Judge Palmieri denied the motion to suppress the tangible evidence[3] taken from Wiener's apartment on the ground that Wiener's consent to the search was voluntary and unequivocal.

The judge's conclusion was based on his finding that he believed the testimony of the agents and did not believe the testimony of Wiener and his wife. The resolution of such an issue of credibility of course is the classic function of the trier of the facts. We will not set aside such a finding unless clearly erroneous. We hold that Judge Palmieri's factual finding of consent[4] was not clearly er-

---

1 Wiener was sentenced to three concurrent terms of imprisonment: two years on Count One (conspiracy to distribute hashish and to possess it with intent to distribute); two years on Count Two (possession of hashish with intent to distribute); and six months on Count Three (possession of marijuana with intent to distribute). He was ordered placed on special parole for two years after expiration of his prison sentence. He also was fined $2,500 on Count One and $2,500 on Count Two, for a total committed fine of $5,000.

Prior to the commencement of Wiener's trial, his co-defendant, Steven Silverman, pleaded guilty to Count One, the conspiracy count. After Wiener's trial, Silverman was sentenced to a term of five years imprisonment, all but two months of which was suspended, and was placed on probation for one year.

2 Wiener does not challenge the sufficiency of the evidence to support his conviction. He states in his brief that "viewed in the light most favorable to the Government, the evidence is sufficient to justify a conviction . . . ." Asserting, however, that the government's case was far from strong, he invites us to examine with care the claims of error which he does raise. We have done so.



*Opinion of the Court of Appeals*

3 This tangible evidence, later admitted in evidence at the trial, consisted of marijuana, hashish smoking paraphernalia and a loaded gun—all found together in a burlap bag in a half-open closet in Wiener's apartment.

4 Among the other facts which support the judge's finding of a voluntary consent—in the judge's words, "almost . . . a gracious invitation to search the apartment"—are Wiener's background (32 years of age, 3 years attendance at college, a successful and experienced restaurant manager); his understanding of his right not to incriminate himself (having twice been given the standard *Miranda* warnings); his under-

roneous. *United States* v. *Miley*, 513 F.2d 1191, 1201 (2 Cir.), *cert. denied*, —— U.S. —— (1975); *United States* v. *Faruolo*, 506 F.2d 490, 493 (2 Cir. 1974); *United States* v. *Fernandez*, 456 F.2d 638, 640 (2 Cir. 1972).

In holding as we do on this issue, we are mindful that Wiener was in custody at the time he gave his consent, in contrast to *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 248 (1973), and many other cases where consent searches have been sustained. The fact of custody does not alone preclude the giving of a voluntary consent, *United States* v. *Watson*, —— U.S. ——, —— (1976), 44 U.S.L.W. 4112, 4116 (U.S. Jan. 26, 1976); *United States* v. *Candella*, 469 F.2d 173, 175 (2 Cir. 1972); *United States ex rel. Lundergan* v. *McMann*, 417 F.2d 519, 521 (2 Cir. 1969), but it should require more careful scrutiny. We have done just that.

## II.

Wiener also claims that the court abused its discretion in admitting in evidence the loaded Pietro Beretta pistol which was found in his apartment at the time of the search on the day of his arrest. We disagree.

Although Wiener was arrested on the street a short distance from his apartment and a half block from where the 40 pound hashish transaction charged in the indictment occurred, there was abundant evidence for the jury to consider that Wiener's apartment was the focal point of the conspiracy. According to the testimony of co-conspir-

standing of the permission he was granting to conduct the search (having repeated his invitation to search the apartment after the agent rephrased the question specifically in terms of "consent to search the apartment"); the fact that Wiener himself initiated the return to and entry into his apartment; and the absence of any force, deceit, fraud or abuse on the part of the agents. See *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 226, 248-49 (1973).



ator Silverman, it was there that Wiener discussed with Silverman the availability of 800 pounds of hashish; it was there that Wiener had distributed hashish to Silverman and had collected money from him in prior dealings, it was there that Wiener had received large quantities of hashish; it was there that arrangements had been made for the instant 40 pound transaction; it was there that Wiener had disposed of all but 40 of the original 800 pounds of hashish; and it was there that the jury could have inferred that approximately a half million dollars of illicit cash from hashish had come into Wiener's hands during the month of October 1974. In short, Wiener's apartment was the logical place for Wiener to keep the gun since there was evidence that this was where the narcotics were stashed, the negotiations took place and the money was kept, at least temporarily. Moreover, the loaded gun here in question was found in Wiener's apartment *in the same burlap bag* that contained marijuana and hashish smoking paraphernalia. Note 3 *supra*.

Experience on the trial and appellate benches has taught that substantial dealers in narcotics keep firearms on their premises as tools of the trade almost to the same extent as they keep scales, glassine bags, cutting equipment and other narcotics equipment.

We hold that the gun was relevant to the issues upon which Wiener was tried and that the court did not abuse its discretion in holding that its probative weight was not overbalanced by the inflammatory tendency of the gun as evidence. See *United States* v. *Campanile*, 516 F.2d 288, 292 (2 Cir. 1975); *United States* v. *Fisher*, 455 F.2d 1101, 1103-04 (2 Cir. 1972); *United States* v. *Ravich*, 421 F.2d 1196, 1204-05 (2 Cir.), *cert. denied*, 400 U.S. 834 (1970); *United States* v. *Pentado*, 463 F.2d 355, 360 (5 Cir. 1972), *cert. denied*, 409 U.S. 1079 (1972) and 410 U.S. 909 (1973).

III.

Finally, Wiener claims that he was prejudiced by the court's charge to the jury in several respects.

The only aspect of the charge which we believe warrants brief mention[5] is the court's summary or marshalling of

5 We find no merit in Wiener's other attacks upon the charge.

The court's statement that if "we have engaged in a monstrous charade . . . you should have no hesitancy in acquitting the defendant", could well have been intended to be and to have operated in Wiener's favor although he argues that it had a contrary effect.

With respect to the witness Silverman (as to whom the court had given the standard accomplice charge, preceded by full instructions on credibility of witnesses), Wiener complains of the following isolated portion of the court's reference to Silverman:

> "I don't know how you are going to come out with respect to his testimony and, as I say, I do not wish to make any suggestions to you whatever, but I do say this: That regardless of how he comes out, Silverman is an extremely intelligent person. He considered every question that was put to him very carefully and he articulated his responses with consummate care and I respectfully suggest that regardless of what else he may be he is a very intelligent person."

Standing alone, this comment on the credibility of Silverman, especially against the defense contention that he was mentally unstable, might be viewed as coming pretty close to the line of impermissible comment. It must be considered, however, in light of the court's previous credibility instruction which included the following (Silverman being the only witness with a college education):

> "A man with a criminal record and without an education can tell the truth. A man with a college degree and who is perfectly articulate and speaks with an Oxonian accent can be a liar. . . ."

Moreover, at the request of defense counsel, the court gave the following supplemental instruction on Silverman's credibility:

> "Now, on Silverman, this Stephen Silverman. Obviously he had a motive to lie. He had more than one motive to lie. He had as many motives to lie as he had federal offenses that he had committed and he admitted on the stand any number of offenses that he had committed, if you accept his statements about the wheeling and dealing in hashish.
>
> If you think he lied and you didn't get the truth from him, that is your privilege and your duty, but please, don't permit me to govern your fact-finding conclusions in any way."

Finally, Wiener complains of the court's failure to charge that Steven Silverman's alleged perjury was motivated by his desire to cover up



the evidence. Wiener claims that the court's recitation of the facts was one-sided and argumentative. As any trial judge knows, even the most meticulous effort to balance a summary of the evidence in the charge inevitably will be met with a claim of distortion. We have carefully examined Judge Palmieri's charge as a whole and we find Wiener's claim of distortion to be without merit, having in mind particularly that the charge immediately followed summations by counsel which in turn followed two days of evidence, all of which took place within a period of three successive days.

Nevertheless, mindful that this was a relatively short, uncomplicated trial involving one defendant, essentially one narcotics transaction, and all on one day, we are constrained to renew our suggestion that trial judges in this circuit should carefully consider the preliminary question of whether any further summary of the evidence is needed in the charge in a case of this sort. See *United States* v. *Kahaner*, 317 F.2d 459, 479 n. 12 (2 Cir.), *cert. denied*, 375 U.S. 835 (1963). A case like this is in sharp contrast to a complicated stock fraud, involving the conspiracy of several defendants, the state of proof with respect to each of whom was both varied and intertwined, see *United States* v. *Kelly*, 349 F.2d 720, 757 (2 Cir. 1965), *cert. denied*, 384 U.S. 947 (1966).

We have considered carefully all of Wiener's claims of error and find them to be without merit. We order that the mandate issue forthwith.

Affirmed.

the masterminding of the transaction by his friend Larry Silverman. Upon the record as a whole, this strikes us as not a failure to charge a theory of the defense but simply an omission of one of the many attacks leveled at the witness' testimony.